

No. 14722

IN THE

United States Court of Appeals
For the Ninth Circuit

TERESA E. EASTMAN, Administratrix of
the Estate of Eric Gunner Eastman,
deceased, or individually as his sur-
viving widow,

Appellant,

VS.

SOUTHERN PACIFIC COMPANY,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court for
the District of Oregon*

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FILED

OCT 20 1955

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viving widow,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Appellee.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Oregon over the cause of action is conferred by 45 U.S.C.A. No. 51 and by 45 U.S.C.A. No. 56. Plaintiff is a citizen, resident and inhabitant of the State of Oregon. Defendant is a Delaware corporation duly authorized to do business in Oregon. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00. The cause of action arose in Oregon. These agreed facts were set forth in the pre-trial order (Tr. 3) and conferred jurisdiction on the court below by reason of 28 U. S. C. A. 1331, 1332. (1) The jurisdiction of this court to consider this appeal is conferred by 28 U. S. C. A. 1291.

STATEMENT OF THE CASE

This was an action filed in the United States District Court for the District of Oregon for the recovery of damages for personal injuries resulting in the death of Eric Gunner Eastman. Plaintiff is the widow of decedent Eastman and brought this action as Administratrix of his estate and as his surviving widow. Plaintiff in her pre-trial order stated her cause of action on three theories:

(1) Under the Federal Employers Liability Act (45 U. S. C. A. No. 51) (Tr. 5-7).

(2) The Oregon Employers Liability Act. (No. 654.305 O. R. S.) (Tr. 7-10).

(3) On common law negligence. Plaintiff contended that the employer was engaged in a hazardous occupation within the meaning of the Workmen's Compensation Law of the State of Oregon (No. 656.022 O. R. S.) and that the common law defenses of contributory negligence, fellow servant and assumption of risk were no defense for the employer by reason of No. 656.024 O. R. S. (Tr. 10-13).

The cause was tried to a jury before the Honorable Gus J. Solomon on January 21, 1955. The trial court submitted the case to the jury solely on the first theory of plaintiff, namely, the Federal Employers Liability Act (Tr. 160). The jury returned its verdict in favor of the plaintiff and against the defendant and assessed plaintiff's damages in the sum of \$10,000.00. This verdict was filed January 25, 1955 (Tr. 17). Thereafter defendant filed its motion for judgment notwithstanding the verdict. (Tr. 18), and on February 4, 1955, the lower court on hearing said motion set aside the verdict of the jury in favor of the plaintiff and ordered that defen-

dant have judgment in its favor against the plaintiff. (Tr. 20.) In this order the trial judge stated that in his opinion the motion for a directed verdict made by the defendant at the close of the case should have been granted for the reason that there was no evidence that the defendant was guilty of negligence in any particular charged by the plaintiff. (Tr. 20.) It is from the action of the trial court in setting aside the verdict returned by the jury in favor of the plaintiff and in entering judgment for the defendant that this appeal is taken. The question presented for review on appeal is whether or not the defendant was negligent in any particular charged and whether or not the death of Eric Gunner Eastman resulted in whole or in part from such negligence within the meaning of the Federal Employers Liability Act.

SPECIFICATION OF ERROR NO. 1

The lower court erred in setting aside the verdict returned in favor of plaintiff and in entering judgment for the defendant. (Tr. 20.)

ARGUMENT

(a) Summary of Argument.

- (1) Factual outline
- (2) Review of the Federal Employers Liability Act and recent decisions.

Factual Outline:

On October 16, 1952, Eastman was employed in defendant's Eugene yards as a millman. His immediate supervisors were Jerome Lambert, a lead man, and Carl M. Wood, his foreman. His regular duties as a millman were to work in the mill room of the defen-

dant's repair shop as a carpenter and to do the carpenter work in railway cars on the repair track. (Tr. 29.) On this day Eastman was working on a flanger car which was immediately adjacent to a maintenance of ways Clark type dump car on Track No. 15. This repair track runs from East to West. (Tr. 107.) The flanger car was immediately west of the dump car. (Tr. 109.) Prior to the day of the accident, Foreman Wood had instructed Eastman on the job of moving the seats in the flanger car from one side to the other. (Tr. 80.) No particular time was specified for doing this work and Eastman had a good deal of discretion as to when and how the work should be performed. (Tr. 88.) Eastman would be required to move in and about the repair yard to and from the mill room for lumber or tools and to and from the flanger car. (Tr. 88-89.) Carmen McGregor and Barker had been assigned to the repair of the dump car to the East of the flanger car. (Tr. 110.) The dumping mechanism on the dump car was defective and the car had been placed on Track No. 15 to make the dumping mechanism operative. McGregor and Barker made two applications of the air and the car would not dump. They had been at the dump car about 20 minutes when Lambert, the lead man, arrived and saw they were having difficulty. (Tr. 112.) Shortly after Lambert arrived at the dump car, McGregor saw Eastman for the first time. (Tr. 112.) Eastman came to the East end of the dump car. (Tr. 113.) Lambert apparently walked around the car and then started under the car on the South side. (Tr. 115.) At that time, according to McGregor's testimony, Eastman was standing with McGregor about 7 feet from the track and about one-third of the length of the dump car from its East end. (Tr. 115.) We believe that it is fair to state at this point that the testimony as to the events that

transpired hereafter is in conflict. McGregor on direct examination testified that as Lambert went under the dump car, "Eastman took about two steps with him, and he had his finger on him," that Lambert then applied the pick handle to the buckled dumping arm, the door dropped and struck Eastman on the head. (Tr. 118.) Again on redirect, McGregor testified as follows: (Tr. 124.)

The Witness: "Yes he pushed under after him, he pushed toward him after him, had his finger out pointing to something where he went."

McGregor testified further that he was seven feet from the track when the door fell down. (Tr. 118.) The credibility of the testimony of witness McGregor was put in question by Coroner Sutton who made the official investigation the day after the accident. He testified that McGregor said,

"Eastman had just gotten down off of the flanger car and walked around to talk to McGregor, they were both standing together. No mention was made of him walking under the car." (Tr. 136.)

"... and I am sure that McGregor said he jumped back out of the way. There was nothing ever said, to my knowlege, about him walking back under the car or walking towards the car, to the best of my recollection." (Tr. 132.)

McGregor had denied making any statement of this nature. (Tr. 129.) According to Lambert, the last time he saw Eastman before he went under the car he was standing beside McGregor. (Tr. 70.) Directly after the accident Eastman was six feet from the rail on the ground according to Lambert. (Tr. 61.)

The particular dump car being repaired was of an intricate design and complicated mechanism. The workmen assigned to this repair were not familiar with its complex mechanism. Lambert testified that he had not worked on this type of car prior to the accident. (Tr. 45.) McGregor was actually a regular cook and dishwasher but classed as a car repairman. (Tr. 101.) McGregor testified at Tr. p. 114-115:

Q. Mr. McGregor, had you seen this kind of car in operation before, this dump car?

A. It was a very rare car around this vicinity. I saw one once before; yes, I did.

Barker, the other repairman, testified on this point as follows:

Q. You are not acquainted with the particular mechanism of this car, are you?

A. No, sir.

Q. That is why you called Mr. Lambert over, isn't it?

A. That is right.

Barker again testified: (Tr. 72).

Q. Prior to October 16th of 1952 had you ever worked upon a Clark type of western dump car?

A. I don't know whether I had or not.

Q. Do you think you did, or didn't you?

Mr. Gearin: He said he didn't know.

The Witness: I don't know whether - - - there ain't very many of them come through.

For a detailed explanation of the mechanical parts and operation of this dump car we direct the court's attention to the testimony of Witness Lambert, who, since the accident, appears to have acquired a rather healthy familiarity with its mechanism. For our purposes here it is sufficient to state that its mechanism was complex, there was a general lack of familiarity with its operation by the workmen assigned to its repair and

a complete failure on the part of the defendant to show by any satisfactory evidence that Eastman had been fully advised of all of the dangers attendant at the time of the accident. At the time Eastman arrived at the scene the air had been hooked up and applied to the dump car. (Tr. 112.) The pistons on the end of the car had been turned and placed in a position to dump the car to the South. (Tr. 75.) The door hooks on the top on the South side were in an open position and the door or apron slightly ajar. (Tr. 55.) The third and last locking device was a valve located under the car. (Tr. 36.) This too had been turned and was in an open position for dumping to the South. So it was at this time that all of the car locks were open and the lock on the Southeast corner was burned off. (Tr. 47.) The only thing that prevented the car from proceeding through the dumping cycle was a buckled arm on the South side. (Tr. 56.) When Lambert proceeded under the car, he took a pick handle and manually pried this arm into position. (Tr. 54.) The trap was sprung, the door dropped like a guillotine and Eastman was the victim. Lambert knew when he went under the car that it was possible the door would drop and probably would. (Tr. 56.) While under the car, Lambert faced the North and turned his back to Eastman while he pried the buckled arm. (Tr. 60.) Lambert knew at the time he pried the buckled arm that Eastman, Baker and McGregor were all in close proximity. (Tr. 60.) Defendant alleged contributory negligence of decedent in failing to heed a warning to stand in the clear, in leaving a place of safety and in walking forward to the dump car. (Tr. 14.) The trial court carefully instructed the jury on this phase of the case and the jury undoubtedly took into consideration some element of contributory negligence in returning a rather nominal verdict for the plaintiff.

(B) *Review of Federal Employers Liability Act and Recent Decisions.*

The Federal Employers Liability Act sets forth the rights of employes of railroads engaging in interstate commerce to recover for their injuries sustained in the course of their employment, and in case of death, the right of their personal representative to recover damages for the benefit of their dependents. Before the enactment of that Act, an injured railroad worker had a right to sue his employer at common law. The railroad had available such defenses as the fellow servant doctrine, contributory negligence as a complete defense and the doctrine of assumption of risk. As a result, the railroads were well insulated against liability and very few injured railroad workers ever received compensation for their injuries. It was to correct these evils that the Federal Employers Liability Act was passed.¹

The first Employers Liability Act was enacted by Congress in 1906.² It was declared unconstitutional by the United States Supreme Court in the first Employers Liability cases,³ because they included those engaged in intrastate traffic at the time of their injury. The Court declared that Congress had no power to regulate intrastate commerce. Congress in 1908 enacted the second Employer's Liability Act correcting the constitutional defect which appeared in the first Act.⁴ This Act was declared constitutional by the Supreme Court in the second Employers Liability Act cases.⁵ Thus the Federal Employers Liability Act has been in continu-

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1. *Baltimore & Ohio Ry. Co. v. Branson* (1916) 128 Md. 678; 98 A 225 reversed on other grounds (1917), 37 S. Ct. 244, 242 U. S. 623.
 2. 34 Stat. at L. 232.
 3. *Howard v. Central Railroad Co.* and *Brooks v. Southern Pacific Co.* 207 U. S. 463.
 4. 35 Stat. at L. 65; 45 U. S. C. A. No. 51-59.
 5. *Mondou v. New York N H & H R Co.*, 223 U. S. 1 (1912).

ous operation for 47 years and a great body of law has grown up concerning this Act. This Act has been amended only twice, once in 1910⁶ and again in 1939.⁷

The Act provides that every common carrier by railroad shall be liable in damages to any of its employes while he is employed by such carrier in interstate commerce for injuries resulting in whole or in part from the negligence of any one of the officers, agents or employes of the carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves or other equipment.⁸ The Act applies only to railroad workers, that is, employes of common carriers by railroad. Under this Act, the railroad is also liable for the death of any employee under the above circumstances of negligence. In this connection the Act provides that the railroad shall be liable in damages in case of the death of such employe to his or her personal representative for the benefit of the surviving widow or husband and children of such employe, and if none, then such employe's parents, and if none, then of the next of kin dependent upon such employe.⁹ Since the passage of the 1939 Amendment, the question as to whether a railroad employe is engaged in interstate commerce is seldom raised. Even employes who are engaged in repairing equipment which is not in actual use have been held to be entitled to the benefit of the Act.¹⁰ The Act has also been held to apply to employes repairing cars. In *S. P. Co. v. Industrial Accident Commission*, 19 Cal. 2d. 271, Mistretti was injured in the railroad shop while repairing a combination truck and

6. 36 Stat. at L. 291, 45 U. S. C. A. No. 56 and 59.

7. 53 Stat. at L. 1404, 45 U. S. C. A. No. 51, 54, 56 and 60.

8. 45 U. S. C. A. 51.

9. 45 U.S.C.A. 51

10. *Edwards v. B & O Railroad Company*, 131 F. 2d. 366

boom car, a unit of maintenance of way relief outfit used for clearing the track of obstacles. In *S. P. Co. v. Industrial Accident Commission*, 19 Cal. 2d. 281, Rogers, the employe, was a switchman engaged in breaking up freight trains after their arrival at a terminal and making up such trains prior to their departure. In *S. P. Co. v. Industrial Accident Commission*, 19 Cal. 2d. 283, the employe was engaged in the railroad shops in repairing a freight car used in both interstate and intrastate commerce. In *Lewis v. Industrial Accident Commission*, 19 Cal. 2d. 284, the switching crew of which Lewis was a member did not handle any cars destined for interstate commerce until after he was injured. In *Copley v. Industrial Accident Commission*, 19 Cal. 2d. 287, certiorari denied, 316 U. S. 678, the employe was injured while working as a carpenter on a railroad trestle over which cars moved in both interstate and intrastate commerce. The Act has also been held to apply to a carman's helper in the railroad company shops who was engaged in repairing several gondola cars which were used for the company's ballast to ballast yard track and main line tracks.¹¹ The Act has also been held to apply to a machinist's helper engaged in repairing a part of a locomotive in the railroad company's round house.¹² Federal District Judge Yankwich in the case of *Holl v. S. P. Co.*, 71 F. Supp. 21 has made an analysis of this situation and listed numerous cases where the Act has been held to apply. It is the exception today, rather than the rule, when the railroad company will deny that the injured worker was engaged in interstate commerce and put him to his proof on that issue as the defendant has done in this case. (Tr. p. 13.)

11. *S. P. Co. v. Industrial Accident Commission*, 88 Cal. App. 2d. 569

12. *Edwards v. B & O Railroad Co.*, 131 F. 2d. 366.

In recent years the tendency has been to allow juries to pass on all questions of fact in Federal Employers Liability Act cases. The United States Supreme Court has discouraged trial courts and lower appellate courts from taking cases from juries where any question of fact is involved, particularly since the decision of the United States Supreme Court in *Wilkerson v. McCarthy*, 336 U. S. 53. In that case the majority opinion was written by Mr. Justice Black. The facts of the case were that plaintiff a switchman, was injured when he slipped on grease which was on a narrow board walk extending over a wheel pit in the railroad company's yard. The trial judge directed the verdict in favor of the railroad company on the ground that said board walk was for the use of pit workers only and was not intended for use by switchmen. Mr. Justice Black in his opinion, at page 60 stated:

“It is true that witnesses for the respondent testified that after the chains were put up, only the carmen in removing and applying wheels used the board to walk from one side of the pit to the other. Thus, the conflict as to continued use of the board as a walkway after erection of the chains was whether the pit workers alone continued to use it as a walkway or whether employes generally so used it. While this left only a very narrow conflict in the evidence, it was for the jury, not the court, to resolve the conflict. It was only as a result of this inappropriate resolution of this conflicting evidence that the State Supreme Court confirmed the action of the trial court in directing the verdict.”

Justice Black in *Wilkerson v. McCarthy* also stated at page 62, 63:

“Courts should not assume that in determining these questions of negligence juries will fall short

of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed question on whim, this Court, speaking through Mr. Justice Holmes, said, 'But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved.' *Aikens v. Wisconsin*, 195 U. S. 194, 206, 49 L. Ed. 154, 160, 25 S. Ct. 3."

As further proof of the change of attitude by the United States Supreme Court concerning interpretation of this Act, we now direct this court's attention to the concurring opinion of Mr. Justice Douglas in *Wilkinson v. McCarthy*. We quote therefrom:

"While I join in the opinion of the Court, I think it appropriate to take this occasion to account for our stewardship in this group of cases."

"The Federal Employers Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations. Not all these costs were imposed for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence. But judges have created numerous defenses—fellow servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability, even though it was responsible for maintenance of unsafe conditions of work. The purpose of the Act was to change that strict rule of liability to lift from employes the prodigious burden of personal injuries which that system had placed upon them and to relieve men, who by the exigencies and necessities of life are bound to labor, from the risks and hazards that could be avoided or lessened by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employe does his work."

“That purpose was not to give him a friendly reception in the courts. In the first place, a great maze of restrictive interpretations were engrafted on the Act, constructions that deprived the beneficiaries of many of the intended benefits of the legislation. See *Seaboard Air Line Railroad Company v. Horton*, 223 U. S. 492, 58 L. Ed. 1062, 34 S. Ct. 635, L.R.A. 1915 C. 1, Ann. Cas. 1915 c. 475. 8 NCCA 834; *Toledo, St. Louis & W.R. Co. v. Allen*, 276 U. S. 165, 72 L. Ed. 513, 48 S. Ct. 215 and the review of the cases in *Tiller v. Atlantic Coast Line R. Co.* 318 U. S. 54, 62, 67, 87 L. Ed. 610, 614, 618, 63 S. Ct. 444, 143 A.L.R. 967. In the second place, doubtful questions of fact were taken from the jury and resolved by the courts in favor of the employer. This court led the way in overturning jury verdicts returned for employees. See *Chicago M & St. P. R. Co. v. Coogan*, 271 U. S. 472, 70 L. Ed. 1041, 46 S. Ct. 564; *Missouri P. R. Co. v. Aeby*, 275 U. S. 426, 72 L. Ed. 351, 8 S. Ct. 177; *New York C. R. Co. v. Ambrose*, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198. And so it was that a goodly portion of the relief which Congress had provided employees was withheld from them.”

“ . . . The second evil was not so readily susceptible of Congressional correction under a system where liability is bottomed on negligence since the condition was one created by the court and beyond effective control by Congress, it was appropriate and fitting that the court correct it. In fact a decision not to correct it was to let the administration of this law be governed not by the aid of the legislation to safeguard employees, but by hostile philosophy that permeated its interpretation.”

Also in *Wilkerson v. McCarthy*, Mr. Justice Douglas stated that a review of the cases coming to the United States Supreme Court from the 1943 term to the 1949 term showed a record more faithful to the design of the Act than previously prevailed. He thereupon set

forth in an appendix to his opinion a list of cases in which certiorari has been granted. He stated that during said period 55 petitions for certiorari were filed in railroad worker's cases and 20 were granted. Of these, one was granted at the instance of the employer and 19 were granted at the instance of an employee. In 16 of these cases the lower court was reversed for setting aside a jury verdict for an employee or taking the case from the jury. In the one case granted at the instance of the employer, the Supreme Court held that it had received the jury trial on contributory negligence to which it was entitled. Of the 35 petitions denied, 21 were by employers claiming that jury verdicts were erroneous or that new trials should have been ordered. The remaining 14 were filed by employees. In ten of these, the lower court had withheld the case from the jury and rendered judgment for the employer. In three it had sustained jury verdicts for the employer, and in one, reversed a jury verdict for the employee and directed a new trial. From this group of cases, Mr. Justice Douglas makes three observations:

(a) The basis of liability has not been shifted from negligence to absolute liability.

(b) The criterion governing the exercise of the discretion of the Supreme Court in granting or denying certiorari is not who loses below, but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.

(c) The historic role of the jury in performing that function is being restored in this important class of cases.

Another leading case decided by the United States Supreme court is the case of *Lavender v. Kurn*, 327 U. S. 645. In that case, which was a death case where no one

saw the accident occur and where the facts were entirely of a circumstantial nature, Mr. Justice Murphy said, at page 653:

“It is no answer to say that the jury’s verdict involves speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.” Only when there is a complete absence of probative facts to support the conclusion reached, does reversible error appear, but where, as here, there is an evidentiary basis for the jury’s verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion and the appellate court’s function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.”

We believe it is a fair comment to make that since the decisions of *Lavender v. Kurn* and *Wilkerson v. McCarthy*, it is indeed very rare today that a trial judge takes a case away from the jury or sets its verdict aside.

In determining whether or not there is sufficient evidence of a specification of negligence to carry a case to the jury under the Federal Employers Liability Act, the test is “evidentiary basis” or “reasonable inference from probative facts” and is no justification for withdrawing an issue of negligence from a jury that the question is merely close or doubtful or that the court might draw a contrary inference.¹³

13. *Lavender v. Kurn*, 327 U.S. 645; 66 S. Ct. 740 (1946); *O’Brien v. Chicago & N. W. Railway Co.*, 329 Ill. App. 382 391; 68 N. E. 2d. 638 (1946)

Only when there is a complete absence of probative facts to support the conclusion reached by the jury does reversible error appear.

To read into the Federal Employers Liability Act the degree of negligence required in order for an employee to recover from an employer is contradictory to the established course of liberal construction of the Act followed by the United States Supreme Court.¹⁵

The doctrine of assumption of risk does not obtain under the Federal Employers Liability Act and by abolishment of this defense in that statute, Congress did not mean to leave open the identical defense for the master by allowing courts to change its name to "non-negligence."¹⁶

It was not the province of the trial court to set aside the judgment for the plaintiff based on the verdict returned by the jury and substitute its own judgment that there was an absence of evidence of negligence.¹⁷

In discussing the recent cases under the Federal employers Liability Act, Raymond J. Moore, in an article entitled "Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers Liability Act" 29 Marquette Law Review 73 (1946) states at page 74:

14. *Lavender v. Kurn*, 327 U.S. 645, 653; 66 S. Ct. 740.

15. *Jamieson v. Encarnacion*, 281 U.S. 635, 640; 74 L. Ed. 1082, 1085; 50 S. Ct. 440; *Brown v. Western Railway of Ala.* 338 U. S. 294, 298; 70 S. Ct. 105 (1949); *Bly v. Southern Railroad Company*, 183 Va. 162, 31 S.E. 2d. 564; 32 S.E. 2d. 659 (1949)

16. 45 U.S.C.A. No. 51; *Tiller v. Atlantic Coastline Railroad Company*, 318 U.S. 54, 63 S. Ct. 444 (1943) *Ray v. Pennsylvania Railroad Company*, 71 F. Supp. 683; *Fussey v. Diesel Tanker Ellen Bushel, Inc.* 85 F. Supp. 92 (1949) *Fleming v. Husted*, 164 F. 2d. 65 (1947)

17. *Blair v. Baltimore & O. R. Co.* 327 U.S. 600, 65 S. Ct. 545, 547, *Vandalia R. Co. v. Kundall*, 119 N.E. 816, 819, *Pittman v. Schultz*, 125 F. 2d. 82. *Penn v. Galveston, H & SA Railway Co.* 82 So. 808, 810; *Williams v. Terminal Railroad Association* 20 S.W. 2d. 584.

“In conformity with the 1939 humanitarian amendment to the Federal Employers Liability Act the enlightened policy of the United States Supreme Court in several recent decisions has been to resolve all inferences in favor of the injured railroad employee. The Court has, in these cases, cast aside any denial of recovery on grounds of non-negligence or that the evidence was conjectural or too remote.” See also the “Federal Employers Liability Act,” Richter and Forer, 12 Fed. R. Dep. 13 (1951.)

As to the broad function of the jury in Federal Employers Liability Act cases, the United States Supreme Court has said:

“The choice of conflicting versions of the way the accident happened, the decisions as to which witness is telling the truth, the inferences to be drawn from the uncontroverted facts, as well as the controverted ones, are questions for the jury. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury’s function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury.” *Ellis v. Union Pacific Railroad Company*, 329 U. S. 649, 67 S. Ct. 598 (1947)

In reversing the judgment notwithstanding the verdict entered after verdict for plaintiff in the case of *Tennant v. Peoria & P. Railway*, 321 U. S. 29, 64 S. Ct. 409 (1944) the Court stated at page 35, as follows:

“It is not the function of the court to search the records for conflicting circumstantial evidence in

order to take the case away from the jury on the theory that the proof gives equal support to two inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusions as to the facts. The very essence of this function is to select from among conflicting inferences and conclusions that which is considered most reasonable. Upon an examination of the record, we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus, to enter judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to jury trial."

The issue of proximate cause as well as the issue of negligence is one for the jury's resolution. Relative to proximate cause, the United States Supreme Court has said:

"The fact that fair minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury." *Stone v. New York Central & St. Louis Railway Co.* 344 U. S. 407, 73 S. Ct. 358 (1952) Citing *Carter v. Atlantic & S. A & B Railway Company*, 338 U. S. 430, 70 S. Ct. 226 (1949) and *Coray v. Southern Pacific Company* 335 U. S. 520, 69 S. Ct. 274 (1949) and *Ellis v. Union Pacific Railway*, 329 U. S. at 653.

The cause need only be a cause in part to present a jury question. See *Carter v. Atlantic & St. A & B Railway Co.* 338 U. S. 430, 70 S. Ct. 226, and the opinion of

Federal Judge James Alger Fee, now of this Court, at 219 F. 2d. 205.

The weight and credibility of the testimony of the witnesses is for the jury as stated in *Chicago & Northwestern Railway v. Grauel*, 160 F. 2d. 820 (8 cr. 1947) at page 826:

“Thus the mere fact that the engineer as well as the other witness was called by the plaintiff did not bind the jury to accept the evidence given by them. The jury was still the judge of the credibility of these witnesses and of the weight to be given to their testimony. The jury could take into consideration in appraising this testimony the fact that they were employees of the appellant railway company and as such interested in avoiding imputations that their negligence caused the death of a fellow employee and the testimony of the engineer was not above question by reasonable minds. (In accord, *Ellis v. Union Pacific*, *supra*, and *Tennant v. Peoria & P U Railway*, *supra*.)

Inferences are also for the jury. *Lavender v. Kurn*, *supra*, and *Ellis v. Union Pacific Railway Co.*, *supra*. To prevent the jury's full function is to deprive the defendant of a jury trial which is his right. *Tennant v. Peoria & P U Railway Co.*, *supra*. In *Bailey v. Central Vermont Railway*, 319 U. S. 350, 63 S. Ct. 1062, at page 354 of the U. S. Reports, our Supreme Court stated:

“To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.”

The common law rule of the duty of the master to warn his servants of dangers within the course of his employment is found in *Prosser on Torts*, 2d. Ed. (1955) at page 376 as follows:

“A further obligation was to warn the servant of any danger connected with the work of which the master knew or which he might discover with proper care and of which the servant might reasonably be expected to remain ignorant.”

The Courts in cases under this Act assume the duty to warn without even considering it necessary to discuss that duty primarily. Their discussion is of the extent to which that duty must be carried out in order to prevent the conduct of the employer being considered negligent. As to this duty, the Supreme Court in *Tiller v. Atlantic Coast Line*, *supra*, at page 67 stated:

“The standard of care must be commensurate to the danger of the business.”

And in *Bailey v. Central Vermont Railway*, *supra*, at page 352 the Court said:

“The duty of the employer becomes more imperative as the risk increases.”

The rule that the standard of care must be commensurate with the danger of the business has been recognized by this Court in *Atchison, Topeka & S. F. Railway Co. v. Seamas*, 201 F. 2d. 140 (9 Cr. 1952).

In *Schnee v. Southern Pacific Company*, 187 F. 2d. 745 (9 Cr. 1951) in a case decided by this Court, the plaintiff was a workman required to use a motor car for performing his assigned duties. The car was derailed and the plaintiff was injured. There was physical circumstantial evidence that a stake was the cause of the derailment, having become lodged between the floor of the motor car and a cross tie. There was conflicting evidence in the record as to the origin of the stake. One theory was that it fell from the front of the motor car when the plaintiff was using it before, the other theory

was that it was a survey stake left by defendant's survey engineers to mark the place where ballast needed filling and leveling to the point indicated on the stake. There was evidence that defendant's agents did place this type of stake from time to time. There was evidence that the plaintiff had driven the motor car over this spot twice before the same day. At page 747 of that opinion, this Court stated:

“What we have said is not to be construed as a determination on our part that there was in the record specific evidence to show that any survey stake had been placed between the rails or that any employee of the defendant company had done any act or thing which could be characterized as negligence proximately causing the derailment of the motor car.”

It is to be noted that no one testified that there was a stake there or that one had been placed there. The jury was permitted to draw that inference assuming the facts to be as stated. The jury was also permitted to draw the inference of knowledge of the dangerous position of the stake or that by the exercise of reasonable diligence the agents of the defendant could have known of the dangerous position. This Court commented that the plaintiff's story as to whether he had a stake on the motor car was in contradiction of evidence as to prior inconsistent statements. It also commented that the theory the defendants espoused was supported by evidence in the record “tending to show considerable probability” and that there was evidence that the accident occurred as the defendant said, but since the evidence did not compel such a conclusion, it was error to remove the case from the jury.

In drawing its inferences the jury is justified in indulging the presumption that the decedent exercised

due care for his own safety at the time of his death. This is evidence to be added to the other evidence in the record. As stated in *Tennant v. Peoria & P U Railway*, supra, at page 34, our Supreme Court stated:

“To this evidence must be added the presumption that the decedent exercised due care for his own safety at the time of his death.”

The Court there was relying on the case of *A. T. & S. F. Railway v. Toops*, 281 U. S. 356, where it is stated:

“It is presumed that the deceased proceeded with diligence and due care.”

In the case of *Stanford v. Pennsylvania Railway*, 171 F. 2d. 632 (7th Cr. 1948) the Court said at page 634:

“To the evidence adduced must be added the presumption that Stanford was in the exercise of due care for his own safety.”

In *Aqua System v. Kodakoski*, 88 F. 2d. 395, it was held that the employer owed the employee the duty to use reasonable care in superintending and directing the latter's work, advise him of the method of doing it and to warn him of any unusual dangers not apparent so as to avoid any preventable accidents to him. Again in *Mather v. Rillston*, 156 U.S. 391, the Court said that if laborers engaged in hazardous occupations are not informed of the accompanying dangers by their employers and they remain in ignorance of the dangers and suffer in consequence, the employers are chargeable for the injuries sustained. In *McCalman v. Illinois Central Railroad Company* 215 F. 465, it was held that the duty of a master to warn his servants of perils to which they will be exposed extends to any change made by him which introduces into their service a new element of danger. In *O'Neil v. St. Louis I, M & S Railway Co.*, 9 F. 337, it was held an employer who intro-

duces without notice to his employee new and unusual machinery, whether it belongs to himself or another, involving an unexpected or unanticipated danger through the introduction of which the employee while using the care and diligence incident to his employment meets with an accident, is liable in damages. Again in *Thompson v. Chicago M. & St. P. Railway Co.*, 14 F. 564, it was held that if an employer knows or by the exercise of ordinary care might know of the hazardous nature of an employment, it is negligence for him to fail to warn his employee thereof and his failure to do so will render him liable to the employee for injuries resulting therefrom.

In the case of *Southern Pacific Company v. Guthrie*, 180 F. 2d. 295 (9th cir. 1949) a verdict and judgment were given for the plaintiff. Defendant railroad appealed on two grounds: (1) No evidence of negligence on its part and, (2) the damages were excessive. A rehearing was later granted on the excessiveness of the verdict as to the damages, but this does not concern the question of evidence to support the negligence. We will consider the case only as to the evidence of negligence. The facts were that the plaintiff was an engineer who had been ordered to Yuma from Gila Bend, Arizona, and could travel by freight or passenger train because of this order. He caught a freight train to Signal, Arizona, and then sought to catch a passenger train due through shortly. Because main line tracks were out of commission, the passenger train went by on the passing track and had to have a switch thrown to return to the main track upon which it would back to the platform for loading. The switch stand was across the main track from the loading platform, on the opposite side. Plaintiff, as is the custom with trainmen not otherwise

employed, was assisting the passenger train crew. He went across the track to the switch stand, threw the switch and gave the come ahead signal. The fireman had dismounted on the switch stand side of the track and started forward to throw the switch when he saw that plaintiff had thrown it. When the plaintiff signaled "come ahead" and started to cross the track, the fireman remounted. All he saw was the plaintiff start across the track. This was because the engine prevented him from seeing more. The fireman crossed over to the other side of the engine and saw the plaintiff's duffle bag, but not the plaintiff. He recrossed to the original side and still did not see the plaintiff. The engineer was on the switch stand side and his vision was obscured by the engine after the plaintiff started to cross. The train was going only three or four miles per hour. Plaintiff testified they were 200-250 feet away from him at the time he threw the switch. Plaintiff testified he stepped into a hole in the ballast which caused his foot to slip so that it became wedged between a tie rod between the switch track points and a switch tie. The court held that the plaintiff's evidence shows that the train could have been stopped, had the fireman informed the engineer at the time he noticed plaintiff was not across the tracks on the platform side. Therefore, it was negligence on the part of the fireman not to so warn the engineer, which proximately caused the injury to the plaintiff. Another ground of liability was found in that area around the switch did not constitute a reasonably safe place to work because of the hole in the ballast.

In the case of *Fritz v. Pennsylvania Railroad*, 185 F. 2d. 31 (7th cir. 1950) the facts were that the plaintiff's decedent had entered an open door of a plant which was a customer of the railroad in order to clear the tracks

which were known to him by experience to be usually littered with debris within the customer plant. The decedent had been in the building many times. He was a conductor. The normal procedure was that the train was not started in the doorway (which had insufficient clearance on one side, only seven to twelve inches, but had no sign upon that side, while it had sufficient clearance, over five feet, on the other side, upon which there was an impaired clearance sign) until the one who had gone inside to check the tracks gave the signal. One employee of the train company who was a part of this particular train's crew, was not experienced as to this building. He testified that plaintiff's decedent gave a back up signal with a hand in which he held a chunk of wood. He held a regulation signal lantern in his other hand and did nothing with that. Another witness who was not employed by the defendant railroad said that he saw no signal. The first witness testified that the back up signal was made continuously over a period of time. The court held that there was a jury issue for there was evidence of negligence if the jury believed the testimony of the witness who was an employee of the train company was not correct. The train employee witness had given the signal to the engineer who backed the car into the building, crushing the decedent on the insufficient clearance side. The engineer, due to the curvature of the track, was unable to see the position of the decedent at any time and had to rely on the signals of the employee witness who testified he saw the back up signal given by the decedent. By rejecting the testimony of the witness who claims that the back up signal was given, the fact, as assumed by the jury, was that a signal was given while one was in an area which was hazardous whereby the motion of the train was started which motion proved to be fatal. Thus, giving

the signal was a negligent act proximately causing the death of the decedent.

Although it is recognized that the following case is not binding authority upon this court, since it is tried under the theory of the Federal Employers Liability Act, its consideration may serve to indicate a general understanding of the nature of liability under the Act. The case is *Colorado & Santa Fe RR. Co. v. Blanton*, 284 Pac. 2d. 736 (Okla. 1935). In that case a cribber, which has rotating blades to dig between the ties, was being operated by one who was not the regular employee assigned for the purpose of moving to a side track. The rotating part of the blades were raised by this employee and at the same time, the plaintiff, a machinist for the defendant railway company, pointed to a union which was leaking oil and which apparently needed repairing with the purpose of showing the defect to another employee. Plaintiff's hand was cut off. Plaintiff's upper body was in view of the employee of the defendant operating the cribber. However, there was no testimony that this employee in fact saw the plaintiff, merely that he could have seen his proximity. The noise level was high. It was held that even though the negligence of the plaintiff in standing close was apparent, the plaintiff stated on cross examination that he was hurt because he was standing too close, there was evidence sufficient to make a case for the jury as to the question of whether defendant acted negligently in raising the cribber when plaintiff was in close proximity thereof.

In *O'Day v. Chicago River & Indiana RR. Co.* 216 F. 2d. 79 (7 Cir. 1954) the plaintiff was injured when he fell down a sharp embankment at a switch position while engaged in changing the switch. The erosion had

taken the ballast out from under the engine switching ties. A grasp of the switch light was required. According to plaintiff's testimony, a stranger came up and plaintiff straightened, lost his grasp on the light and fell. The plaintiff had been working in the area only a few days, "and had been warned earlier by the crew conductor of the dangerous condition existing around the switch." Upon this set of facts, including the warning of the dangerous character of the switch and the area there around, the jury returned a verdict for the plaintiff and the trial judge gave judgment notwithstanding the verdict in favor of the defendant, indicating as his reason that he doubted the plaintiff's story as a witness and believed the story of three of defendant's witnesses that plaintiff made the admission that he fell as a result of a private fight with a trespasser. The court of appeals reversed the judgment notwithstanding the verdict and ordered it vacated. Although the reason given was that the trial judge should not weigh the evidence or substitute his own conclusions for those of the jury, it is apparent that the fact that a warning was given did not absolve the company of its liability arising from the dangerous nature of the area surrounding the switch. Thus, a general warning was inadequate to discharge the company's duty of care owed to an employee.

In *Keith v. Wheeling & L. E. Ry. Co.*, 150 F. 2d. 654 (6th Cir. 1947) plaintiff was employed by defendant railroad and was the engineer of a train on that railroad that collided with another train on the defendant's track. The collision was of the head-on variety. Plaintiff alleged negligence of the defendant's conductor who was with him on the train in not warning him or otherwise stopping the train, since the train order that

governed the train of the plaintiff was clear in the regard that two trains were to pass the plaintiff's train from the other direction while the plaintiff's train was on a certain siding. Plaintiff himself had seen the orders and had repeated them to the fireman. The defendant's conductor had also seen the order and read it but lost it in the caboose after telling the flagman its contents. He made no effort in a 25 minute layover to find it again. The plaintiff's engineer mistakenly pulled out of the siding, believing the tracks clear, after only one train had passed. Two miles from the siding, that is, some time after the train had pulled out of the siding, the head-on collision occurred. The defendant's conductor had made no effort to stop the train, as he could have done. He made no effort to warn that there was a second train either before pulling out of the siding or during the two mile run. He testified that it sometimes occurred that the engineer received changed orders by phone at a siding and pulled out without consulting the conductor and that the conductor took a chance although company orders forbade this. Plaintiff denied such practice. A verdict was directed for the defendant and plaintiff appealed. The action of the court below was reversed and the case remanded. It was held error to direct the verdict since there was evidence of negligence of the defendant's employee, the conductor. The court stated that even though the plaintiff was obviously negligent, the Act requires that the railroad be liable for injury resulting in whole or in part from its negligence.

This case illustrates the fact that although one is warned specifically, as was the engineer in this case, failure to exercise ordinary care on the part of other employees of the defendant is sufficient to predicate the

defendant's liability. Its duty to exercise care is not discharged by a prior warning which subsequently proves inadequate where an ordinary person would have taken other action to prevent this accident.

In *Wilkerson v. McCarthy* at page 63 of 336 U.S. the Court rejected the argument of the Utah Supreme Court that since the plaintiff had overlooked the warnings of chains strung before a greased plank upon which he crossed, slipping and injuring himself, he would have overlooked also any other warnings, such as specific instruction by the railroad not to use the plank; that it was dangerous, or a sign pointing out the danger. The United States Supreme Court said that this was the drawing of an inference from the facts and that the jury must draw the inferences for itself.

In the case of *Johnson v. C. & N. W. Ry. Co.*, 64 N. W. 2d 372 (Minn. 1954) conductor ordered the train engine to go ahead to a side track to warn the train thereon that the train which was to pass there was delayed by safety appliance failure. The engineer wanted to stop at several intervening points to plant flags instead as the time element made it unlikely that they could reach the other train on time. Conductor, in charge of train, ordered "ahead" each time. Engineer's general, rather than specific, instructions were to disobey conductor if danger created. It was held that violation of general instructions was not a bar to his action.

In the case of *Tiller v. Atlantic Coastline Railroad*, *supra*, the District Court directed the verdict for the defendant. The Court of Appeals affirmed. The United States Supreme Court reversed. The affirmance below had been on the theory that no negligence was shown. The facts were that the plaintiff was struck by a car on the reverse end of one train while walking along

another train inspecting seals on the cars thereof, as his duties as a policeman for the line required. The plaintiff had been generally warned that in the switch yard employees must look out for trains as they, (1) carried no lights, and, (2) had no special lookout for the employees in the yards. No specific warning was given as to this particular train. The bell of the train was ringing, but the other train along which the policeman was walking was also moving. The complaint had alleged negligent operation of the train and failure to provide a safe place in which to work. The court conceded in its own statement of the facts that the plaintiff knew of the practice not to light or have a lookout placed on the rear of a backing train and had been, as an employee, instructed to look out for backing trains. On the train which struck the plaintiff there was a man with a lantern, but he was on a step of the caboose on the opposite side from the plaintiff's decedent, thus not visible and unable to see the decedent. The holding in this case is based upon assumption of risk. However, although the Supreme Court did not comment, it is obvious, since there was a warning as to the fact that trains carried no lights and had no lookout in the switch yard, that the Supreme Court considered the warning to be inadequate to relieve the defendants of their duty of care owed to the plaintiff's decedent. Apparently, only a warning which efficiently conveyed the fact that a train was backing toward the decedent would have been adequate.

In the case of *Ellis v. Union Pacific Ry. Co.*, *supra*, the plaintiff was crushed between a building and a car while he was standing on the ground in a position to relay signals of one on a loading platform, around a curve beyond the building, to the engineer. The engineer

could not see the position of the one on the loading platform. The place where the plaintiff was caught was the only place on the arc of the curve where the clearance was insufficient. Plaintiff did not, under his testimony, know the specific hazards of the area, with which he was unfamiliar. Defendant brought evidence to contradict the statement of unfamiliarity. Plaintiff saw no sign, if there was one. The defendant showed that there was a legible sign eight feet above the ground stating, "Impaired Clearance." The plaintiff had a verdict in the amount of Ten Thousand Dollars (\$10,000.00). The Supreme Court of Nebraska reversed for insufficiency of evidence to show negligence and ordered the complaint dismissed. In reversing that Court, the United States Supreme Court held that the jury could have from the facts drawn any one of three conclusions: (1) That the defendant was negligent alone; (2) That the plaintiff was solely negligent; or, (3) That both were negligent in ways contributing to the injury. As to the third, that the defendant was negligent, the Court said it would not have been unreasonable for the jury to have inferred, *inter alia*, that:

"The hazard was not readily apparent and in the form of a trap. That while the sign was placed so to be readily visible from a train, it was insufficient warning to a man on the ground." 352 of 329 U.S.

Thus, the Supreme Court again indicates that a general warning does not discharge the duty of care owed to a plaintiff employee to warn him of the dangers involved in the operation in which he is specifically engaged at the time, where the warning given does not apprise adequately of the specific dangers.

Another case showing that the jury may so infer is the case of *Stanford v. Pennsylvania Railroad*, *supra*,

wherein were no eye witnesses to the accident causing the death of plaintiff's decedent. However, plaintiff's decedent was apparently killed from being crushed between the coal slope of an engine tender and the plug end of a water pipe used to put the water in the tender, which consisted of a stand pipe, a horizontal section and a down pipe. The down pipe was bent and the plug closed after the accident, but no one actually saw what caused those circumstances. The decedent Stanford had gotten down from the engine after it had stopped at the watering station, unlatched the water pipe, turned it over the tender and had then gotten back up on the tender, pursuant to his duties as fireman. The man-hole for water was at the extreme rear of the tender, but when Stanford remounted, the brakeman's cabin on the rear of the tender, which was four and one-half feet high, prevented the plug coming directly over the water hole. The plug would not clear the cabin. It appeared from photographs in evidence that the only way it would clear was to swing the pipe and move the engine forward after the pipe was swung clear of the engine. The engineer sat with his back toward Stanford. He saw Stanford give a signal to move from 24 to 36 inches. He backed up about this distance, saw Stanford give a stop and heard him say, "That will do." He put air to the independent brake and stopped. When Stanford gave the stop signal, he was standing in front of the plug, but on the side of the tender away from which the stand pipe was located. After stopping the engine, the engineer looked up and saw Stanford's hand back over the coal slope. He went to see what the trouble was and saw him pinned by the plug and the slope. On trial, there was a verdict for the plaintiff but the Judge gave judgment notwithstanding the verdict in favor of the defendant, saying:

“The only reasonable explanation of the accident is that Stanford, upon giving the signal and before the engine stopped moving, stepped between the plug and the coal slope, placing himself in a position of danger. That his death was not the result of any negligence on the part of the engineer.”

In reversing and remanding, the Court of Appeals points out that only a complete absence of the probative facts to support the conclusions reached would justify a court in substituting its conclusions for that of the jury. This statement is found at page 634 of 171 F. 2d. 632. The court continued:

“This is so because the choice of conflicting versions of the way the accident happened and the decision as to which witness is telling the truth and the inferences to be drawn from the uncontroverted as well as controverted facts are questions for the jury.”

Thus, though the Judge thought one explanation more reasonable, the Court of Appeals indicated that the jury would have been justified in finding another explanation, which other explanation indicated negligence on the part of the engineer in moving the train after the stop signal had been given. If, as the engineer testified, no movement had been made, it would have been impossible for the fireman to have become pinned in the manner that he did. Even that proposition was gainsaid by an ingenious argument of defendant's counsel on appeal. The Court indicated that so long as the conclusion was a reasonable one, the jury was justified in reaching it.

In *Tennant v. Peoria & P. U. Ry.*, *supra*, there were no eye witnesses to the accident and it might be argued from the fact that tiny bits of flesh were found on the

third car from the engine that the decedent had been crawling between the cars or climbing over the cars and had dropped through. (The third car was not the lead car of the train being pushed.) It was, therefore not the movement without warning which caused the death of plaintiff's decedent, but rather it was the act of the decedent himself in crawling between the cars. The Supreme Court, notwithstanding this possible argument, allowed the jury to find for the plaintiff in its action in reversing a judgment notwithstanding the verdict after verdict entered for the plaintiff. Thus, the theory of negligence upon which the Court must have based its decision was that it was negligence for the engineer to move without warning when he knew the decedent had disappeared in the direction of the movement of the train, in other words, when he knew that the decedent was close in the proximity of the movement.

In *Boton & Maine Ry. v. Meek*, 156 F. 2d. 109 (1 Cir. 1946) the plaintiff's decedent, an employee of three months standing, was struck by a locomotive of the defendant being backed in a watch stand which consisted of a wooden platform. On either side were rails leading to a turntable. The platform was placed so close to the rails that the engines, especially the one concerned, overhung the platform up to 15 inches. The decedent's duty was to strip the locomotive of small tools. This was ordinarily done from the watch stand. As the hosteler, who was alone in the locomotive, backed the engine in he could not see the stand because of the tender. Plaintiff's decedent knew that the engine was going to arrive some time in the near future because he had been sent there to strip the tools from it. The watch stand was highly illuminated. The rear of the tender

had a searchlight, but apparently the bright illumination cancelled out the light of the search light. The night was clear. Some witnesses testified the bell was ringing. One witness didn't recall hearing it. No whistle signal was given. The two specifications of negligence submitted to the jury whereupon a verdict for plaintiff was returned were, (1) for negligent operation of the locomotive and (2) for failure to provide a safe place in which to work. In holding there was sufficient evidence to make a jury question on both specifications, the Court said:

“The jury could in reason find that the failure to provide . . . certain precautions in addition to those provided, constituted causal negligence.”

The Court held that even though the engine was being operated in the customary manner, the jury could have found that the failure to warn of its approach by whistle signal, even though the decedent was expecting the engine, was negligence.

In *Thomas v. Union Pacific Ry. Co.*, 216 F. 2d. 19 (6 Cir. 1954) it was held that knowledge of the plaintiff of the danger does not prevent his recovery, since he does not assume the risk of the danger. In this case the plaintiff was injured as a result of a slip and fall on a grease-covered concrete round-house floor. The decision of reversal was based upon an erroneous instruction which stated that if the plaintiff knew the danger or if it was obvious to him as to the defendant railroad, then the defendant was not responsible for this injury.

Conclusion

Although plaintiff alleged ten specifications of negligence in her pre-trial draft under the first alternative theory that her cause of action came within the purview of the Federal Employers Liability Act, (Tr. 5-7) only specifications No. 2, 3 and a portion of No. 7 were submitted by the trial court for the jury's consideration. Following are the court's instructions on the specifications of negligence submitted to the jury:

“The claims of negligence upon which Mrs. Eastman, as Administratrix, must recover, if at all, are the following:

1. In manipulating the dumping mechanism at a time when the door locks were in a state of repair and in an open position and decedent was standing in close proximity.” (Tr. 164)

“After you have done that you will consider the other specifications of negligence asserted by the plaintiff against the defendant. In all of them, Mrs. Eastman complains of the failure of the railroad company and its employees to warn her husband. For example, specification No. 2 alleges that the railroad company was negligent in failing to warn plaintiff of the dangerous nature of the particular dump car. Specification No. 3: In failing to warn decedent that the door locks on the side on which the door was to be dropped were in an open position and in a state of repair (sic); four in failing to give the decedent any warning prior to the time Mr. Lambert manually forced into position the dumping mechanism which caused the door to drop on the decedent.” (Tr. 165-166)

We now review the probative facts which support the jury's conclusion that the defendant was negligent, in whole or in part, as charged in the court's instructions. In doing so we must keep in mind that if there

is any evidentiary basis or any reasonable inference to be drawn from the probative facts, then the jury's conclusion must stand and we are not permitted to substitute our own conclusions even though we believe them more reasonable. First, we give consideration to the specification of negligence No. 2 contained in the pre-trial order. (Tr. 5)

“In manipulating the dumping mechanism at a time when the door locks were in a state of disrepair and in an open position and decedent was standing in close proximity.”

As Lambert started under the car on the south side, according to McGregor's testimony, Eastman was standing with McGregor about seven feet from the track at about one-third of the length of the dump car from its east end. (Tr. 115) McGregor testified further that he was seven feet from the track when the door fell down. (Tr. 118) Directly after the door fell down, Eastman was six feet from the rail on the ground, according to Lambert. (Tr. 61) An examination of the photographs of the dump car received in evidence indicates that the dump car extends several feet out and beyond the rails. According to the testimony of Lambert, the dump car door on the south side on which Eastman and McGregor were standing was approximately 30 inches high (Tr. 68) and the door did not drop all the way down to the side of the car but dropped down so as to be in a horizontal position, level with the floor of the car. It would be fair to conclude then, that the outside edge of the door would extend to a point approximately six feet or more to the south of the rail referred to by McGregor and Lambert in their testimony. Certainly, if the testimony of McGregor is to be believed that he and Eastman were seven feet from the rail when Lambert went under the car, then both Mc-

Gregor and Eastman were in close proximity when Lambert turned his back on Eastman and McGregor and manipulated the buckled dumping arm which caused the dump car door to drop. On the other hand, the jury may have believed McGregor when he testified that as Lambert went under the dump car Eastman took about two steps with him and he had his finger on him. That Lambert then applied the pick handle to the buckled dumping arm, the door dropped and struck Eastman on the head. (Tr. 118) Again (Tr. 124) McGregor testified as follows:

“Yes, he pushed under after him, he pushed toward him after him, had his finger out, pointing to something where he went.”

Certainly, if the jury believed this testimony, Eastman was in close proximity, in fact directly under the dump car door, and under no circumstances should Lambert have manipulated any device that would cause the door to drop. The jury, however, may have disbelieved McGregor entirely and may have given great weight to the testimony of Coroner Sutton to the effect that Eastman and McGregor were standing side by side and that as the door came down, McGregor jumped back out of the way. (Tr. 132-136). Considerable doubt was cast on the credibility of the witness McGregor by the testimony of witness Sutton and the jury may have disbelieved his testimony entirely or they may have believed certain portions of it. In any event, Eastman and McGregor were certainly both in close proximity when Lambert manipulated the buckled dumping arm which on both Eastman and McGregor and was facing the caused the door to drop. Lambert had turned his back North. (Tr. 60.) An examination of the photographs indicates that had Lambert looked to the south in the

direction in which the car door was to be dropped when the car dumped, that he would have and could have seen either McGregor, Eastman or both. His testimony on this point indicates that he could have seen Eastman, had he looked, but he did not look and had his back turned on Eastman. (Tr. 60.) The evidence showed that Eastman had a tool in his hand at the time when he was struck by the car door. (Tr. 65-67.) The jury had a right to believe that Eastman was going to or from the mill room and to or from the flanger car, either for the purpose of returning or getting more tools, or bringing lumber or working on some of the power equipment in the mill room necessary for the installation and removal of the car seats in the flanger car, and in doing so, would necessarily have to pass in and about the dump car. For the sake of argument, if the jury believed that Eastman and McGregor were standing side by side seven feet from the rail and the door itself was 30 inches in depth (Tr. 68) and extended out from the car 30 inches (Tr. 68) when in a horizontal position, then if the jury believed McGregor's testimony that Eastman was pointing at something under the car, it could be that Eastman had leaned forward. If Eastman leaned forward and kept his feet in the same position, then his body would, of course, extend forward for a distance of one foot or more and thus be within range of the falling door. The jury could reasonably have believed that Lambert had intended to dump the car to the North rather than to the South where McGregor and Eastman were standing, but had inadvertently misplaced the locks or valves allowing the car to move through the first phase of the dumping cycle to the South rather than to the North. Eastman may not have been advised, or at least fully advised, as to all the circumstances existing at that time or of the

intentions of Lambert, McGregor and Barker. Eastman may very reasonably have had the impression that they were attempting to dump the car to the North rather than to the South. Nowhere in the record did the defendant come forward and show that Eastman had any knowledge whatsoever of the particular hazards attendant with this operation. The silence of the defendants seems to indicate that they did not explain or warn Eastman that (1) each of the three locking devices on the car were in an open position; (2) the attempt was being made to dump the car to the South; (3) the air was hooked up to the car and had been applied at least twice to the car; (4) one of the locking devices was burned off; (5) the door locks at the top were in an open position allowing the car door to remain ajar approximately 2 or 3 inches; (6) the pistons on the ends of the car were placed so as to dump the car to the South; (7) that straightening the buckled dumping arm would cause the door to drop. The conclusion is inescapable that had the defendants made these facts known to Eastman that Eastman would not have remained standing where he did since he is presumed to have used due care for his own safety. Lambert indicated himself that he was not aware that the car would proceed through the dumping cycle, although he said that he was aware that it might. This was a possibility. (Tr. 56.) Lambert was the immediate supervisory employee and certainly Eastman had the right to believe that his supervisor would use care for his safety. Lambert indicated in his testimony that it was possible that there was sufficient air in the car lines to commence the first phase of the dumping cycle. (Tr. 55).

We conclude then from a review of the evidence on the phase of the case that the jury could have reasonably found that the defendants were negligent in ma-

manipulating the dumping arm when Eastman was in close proximity.

Following is a review of the testimony of the witnesses Lambert, Barker and McGregor on warning:

(a) Lambert: (Tr. 60)

“Q. Did you give any warning while you were under the car before you manipulated that dumping arm as to what you were going to do?”

A. Not while I was under but just before I went under, yes.

Q. Did you make any statement at all while you were under the car manipulating that dumping arm?

A. No, none was required.

Q. And you knew at that time that Mr. Barker, Mr. Eastman and Mr. McGregor were all in close proximity, didn't you?

A. Yes.”

(b) Barker: (Tr. 81-82) on cross-examination.

“Q. Mr. Barker, while you were out there manipulating the valves for the air mechanism did you give any warning to Mr. Eastman?”

A. Yes, sir.

Q. What did you tell him?

A. I told him, “You better get back out of the way. You might get hurt.”

Mr. Sahlstrom: Your Honor, we object to that question and ask that the answer be stricken for the reason that it is too remote in time. This is prior to the accident time.

The Court: Read the question.

(Last question read.)

The Court: How long was that before the accident?

The Witness: Oh, that was — I couldn't say exactly; a few minutes though.

The Court: Was it less than 15 minutes

The Witness: Oh, yes, I would say so.”

(On redirect Examination) (Tr. 82)

“Q. Mr. Barker, when you were operating those levers to try and dump that car, that was some time before Mr. Lambert came along; isn't that right?

A. Yes.

Q. And after a time you could not dump the car and then you got Mr. Lambert to come over and help; is that right?

A. Yes.

Q. So when you gave this warning to Mr. Eastman that was when you were operating the valves some time before; was it not?

A. That is right.

Q. You gave no warning to Mr. Eastman at all at the time Mr. Lambert was under the car and was trying to bring this door down, did you?

A. No, sir.”

(c) McGregor: (Tr. 121) (On cross examination)

Q. When you were standing in the clear there with Mr. Eastman before Mr. Lambert went under the car was there anything said to Mr. Eastman about his standing close by there or being in the vicinity?

A. Well, when I went on the other side of the car I told him to keep in the clear. I was afraid, you know, and this car being only able to dump on one side I wasn't afraid on that side.”

An examination of all the testimony quoted above indicates that nowhere was Eastman warned of the dangerous nature of this particular car as charged in specification of negligence No. 3. (Tr. 5-7). Eastman was a carpenter and the dump car that he was required to work next to and to pass about and around was a device apparently foreign to his supervisor, Lambert and his

fellow workers, Barker and McGregor. Barker had arrived first and set the air. (Tr. 110). McGregor then arrived approximately 7:55 A. M. (Tr. 109) and Lambert approximately 20 minutes later. (Tr. 112). Barker and McGregor had tried to dump the car, had opened the locks and turned the pistons on the end of the car. They were unable to dump the car and were having difficulties. (Tr. 112.) Shortly after Lambert arrived, McGregor saw Eastman for the first time. (Tr. 112-113.) Apparently then all of the preliminary work had been done by Barker and McGregor before Eastman arrived. When Lambert came on the scene, he walked around the car and observed the disabled dumping arm on the South side. So it was that the stage was all set when Eastman arrived and all that remained to be done to drop the 1 1/2 ton door was to "trigger" the buckled arm. Certainly, Eastman was on hand only for a brief moment and could not have been expected to know all of the dangers lurking in this complex mechanical device. The testimony of Lambert does not indicate what warning, if any, was given. The testimony of Barker was certainly unenlightening and was limited to a time when Barker was applying the air at the end of the car and the situation was entirely different for the reason that Barker was attempting to dump the car over on its side by the use of air pressure. The testimony of McGregor seems to indicate that his statement was made while he and Eastman were on the North side of the car. Eastman's lips were sealed by death, but McGregor, Lambert and Barker were present in court, called as adverse party witnesses, and had they given Eastman any or an adequate warning of the attendant dangers and perils prior to the accident, we are confident that this would have been fully developed by the experienced counsel for defendants on cross-examina-

tion or in their case in chief. Defendants pleaded the failure of Eastman to heed the warning to stand in the clear given by other employees. (Tr. 14.) The jury was fully instructed in this phase of the case by the learned trial judge and defendants had the opportunity of having this defense fully considered by the jury.

A unanimous Federal Court trial jury has rendered its verdict in favor of the plaintiff. We submit that from a review of all the evidence in this case that their conclusion had a reasonable basis and the verdict should be allowed to stand. The judgment for defendant notwithstanding the verdict entered by the trial court should therefore be set aside and judgment based on the verdict of the jury in favor of the plaintiff be entered.

Respectfully submitted,

E. B. SAHLSTROM,
of Counsel for Plaintiff.

